

09-10-2002

**THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK AND APPEAL BOARD**

THE MATTER OF TRADEMARK REGISTRATION NO. 2,372,585
Registered August 1, 2000

BOYDS COLLECTION, LTD.,
Petitioner,

v.

HERRINGTON & COMPANY, INC.,
Registrant.

Cancellation No. 32,146

**Mark: TBC HERRINGTON'S TEDDY
BEAR CLUB & Design**

Registration No.: 2,372,585**Registration Date: August 1, 2000**

**REGISTRANT'S MOTION TO STRIKE AND OBJECTIONS TO
PETITIONER'S NOTICE OF RELIANCE
AND EVIDENCE DECLARATION OF KELLY AUSERMAN**

Pursuant to TBMP §§ 533 and 718.02(b) and (c), Registrant HERRINGTON & COMPANY, INC. (hereinafter "Registrant") hereby moves to strike and objects to the Notice of Reliance filed by petitioner BOYDS COLLECTION, LTD. (hereinafter "Petitioner") on April 22, 2002, in the above referenced cancellation action (the "Notice of Reliance"); and pursuant to TBMP §§ 534.02 and 718.03(b) and (c), Registrant hereby moves to strike and objects to the "Evidence Declaration" of Ms. Kelly Ausherman noticed in the Notice of Reliance.

I. INTRODUCTION

On July 31, 2002, Registrant filed a Motion for Judgment against Petitioner for its failure to prosecute the above-captioned action. Petitioner recently filed the Response to Registrant's Motion for Judgment ("Response") claiming that judgment should not be entered against it on the ground that it did file a Notice of Reliance before the close of its testimony period. The Response was filed on August 20, 2002. It is undisputed in the Response that Petitioner failed to conduct any discovery in this case, failed to take any testimony in this case and that the only document filed during the Petitioner's testimony period was the Notice of Reliance purportedly filed (but not served) on April 22, 2002—the closing day of the Petitioner's testimony period.

The Response was filed on August 20, 2002 and received by Registrant on August 21, 2002. This was the first time that Registrant was made aware that the Notice of Reliance had

been filed in this case. McArthur Decl.¶ 2. Petitioner failed to serve a copy of the Notice of Reliance on Registrant, as required by TBMP § 113, when it allegedly filed the Notice of Reliance with the Board on April 22, 2002. Petitioner does not dispute it failed to serve the Notice of Reliance on Registrant when it was filed or any time during its testimony period.

Now, some four months later and long after Registrant's testimony period has closed, Petitioner decided to inform Registrant of this fact—a fact that would have substantially affected and changed Registrant's action in this case and/or its introduction of evidence during Registrant's testimony period. McArthur Decl.¶ 4. The failure to comply with service requirements is, thus, not merely a procedural defect, but has prejudiced Registrant in this action.

The form Notice of Reliance is readily deficient. Not only does the Notice of Reliance fail to comply with the procedural requirements of the Trademark Rules, but the documents upon which Petitioner is giving notice of its reliance are inadmissible under the Federal Rules of Evidence and TBMP § 700 *et seq.* Petitioner seeks to cure one of the procedural defects in its Notice of Reliance by apologizing to the Board (though the prejudice flows to Registrant) for its “oversight” in not serving Registrant with a copy of the Notice of Reliance as required by TBMP § 113. However, as to the other procedural and substantive defects in the Notice of Reliance and the “Evidence Declaration” of Kelly Ausherman, Petitioner fails to explain or offer any justification for those defects.

Registrant filed a reply to Response on September 9, 2002, that sets forth why Registrant's Motion for Judgment is still proper and should be granted by the Board. Petitioner's Notice of Reliance fails as a matter of law because Petitioner has failed to take any discovery or testimony and failed to offer any *admissible* evidence in this case. In the instant Motion, Registrant sets forth its objections to the Notice of Reliance and the documents it is attempting to offer into evidence and requests that the Board strike the Notice of Reliance in whole based on those deficiencies.

II. DEFICIENCIES IN THE NOTICE OF RELIANCE

Petitioner states in the Response that “[t]he Notice of Reliance satisfied all the formalities of 37 C.F.R. § 1.10.” Although Registrant is relieved that Petitioner managed to

satisfy the requirements for mailing a document to the TTAB by Express Mail, Petitioner has failed to comply with any of the requirements for submitting evidence under 37 C.F.R. § 2.120 or 37 C.F.R. § 2.122 – the sections of the Code of Federal Regulations governing notices of reliance in discovery matters and matters of evidence, respectively.

The testimony period for petitioner is the period that petitioner puts on its case, also called the trial period. TBMP §§ 701 and 702. In this instance, Petitioner has “put on its case” by attempting to rely on one so-called “Evidence Declaration” of an employee of Petitioner Ms. Kelly S. Ausherman (the “Ausherman Declaration”) and Exhibits B through L attached thereto.¹

A. Procedural Deficiencies.

1. The Ausherman Declaration is Not a Discovery Document.

Documents offered into evidence by filing a notice of reliance are certain specified types of evidence obtained from discovery. 37 C.F.R. § 2.120(j) and TBMP § 718.02. That is, 37 C.F.R. § 2.120(j) allows for the introduction into evidence, by notice of reliance, of (1) discovery depositions, (2) answers to interrogatories, (3) answers to requests for admission, and (4) certain produced documents under 37 C.F.R. § 1.122(e) (i.e., printed publications and official records). The Ausherman Declaration is not any fruit of discovery as the Response admits “no discovery was conducted [by Petitioner] in this matter.” See Response, page 1, ¶ 2, in Exhibit A to McArthur Decl.

Additionally, Petitioner has cited to no rule or authority for the introduction of its so-called “Evidence Declaration,” i.e., the Ausherman Declaration. Nevertheless, it is obvious from reviewing the Notice of Reliance that Petitioner fails to comply with the procedural requirements of any of the applicable rules under which such evidence could be submitted. The Ausherman Declaration fails to be and is admittedly not a discovery deposition. Thus, under 37 C.F.R. 2.120(j), a Notice of Reliance cannot be used by Petitioner to introduce the Ausherman Declaration into evidence. Accordingly, because this defect is not curable by Petitioner, Registrant hereby moves to strike the Notice of Reliance as a whole under TBMP

¹ Registrant notes that the Ausherman Declaration makes no reference to and does not attach an Exhibit A. It is unknown where Ms. Ausherman’s Exhibit A is located as 37 CFR 1.123(g)(2) requires that all Exhibits filed with the Board be consecutively numbered.

§ 718.02(b).

Registrant acknowledges that under the TBMP § 716, the parties may, with the Board's approval, stipulate for the admission of specified matter into evidence, including that the testimony of a witness be allowed in the form of an affidavit by the witness. TBMP § 716 and 37 C.F.R. § 2.123(a)(2). However, this declaration of Ms. Ausherman was never noticed or brought to the attention of Registrant, never served upon Registrant and, least of all, was never stipulated to by Registrant or approved by the Board. McArthur Decl.¶ 5. Thus, Registrant hereby moves to strike the Notice of Reliance as a whole on the ground that it fails to comply with the procedural requirements of the rule under which it was submitted.

Furthermore, assuming in the alternative that the Ausherman Declaration is a testimony deposition of Petitioner's witness, the Notice of Reliance is still procedural deficient. Every testimony deposition taken must be filed, and when filed, becomes part of the record; a notice of reliance thereon is not necessary. 37 C.F.R. § 2.123 and TBMP §§ 713.12 and 404.02. Thus, under 37 C.F.R. § 2.123, a Notice of Reliance cannot be used by Petitioner to introduce the Ausherman Declaration into evidence. Accordingly, because this defect is not curable by Petitioner, Registrant hereby moves to strike the Notice of Reliance as a whole under TBMP § 718.02(b), as it fails to comply with the procedural requirements of the rule under which it was submitted.

2. Petitioner Failed to Serve a Copy of the Notice of Reliance on Registrant.

As mentioned above, Petitioner failed to serve a copy of the Notice of Reliance on Registrant, when it allegedly filed it with the Board as required by TBMP § 113. Therefore, Registrant was never given the proper opportunity to respond and object or request to strike the Notice of Reliance until now and after its own testimony period has closed. Petitioner's tardiness is not excusable as it is prejudicial to Registrant. The burden of Petitioner's error must not be foisted upon Registrant. Accordingly, Registrant moves the Board to strike the Notice of Reliance in its entirety.

B. Substantive Deficiencies.

Registrant hereby objects to the Notice of Reliance on the substantive grounds that the Ausherman Declaration and the documentary evidence attached thereto are procedurally deficient and inadmissible under the Federal Rules of Evidence. Evidence not obtained and

filed in compliance with the Code of Federal Regulations will not be considered. 37 C.F.R. §§ 2.121(j)(8) and 2.123(l). The Ausherman Declaration was not filed in compliance with the Code of Federal Regulations or the Trademark Rules.

1. The Ausherman Declaration.

Assuming (for lack of any more appropriate alternative) that the Ausherman Declaration is submitted as a discovery or testimony deposition, it is incompetent and procedurally defective. Accordingly, Registrant moves to strike and objects to the Ausherman Declaration in its entirety under TBMP §§ 534.02 and 718.03(b) and (c).

a. No Notice of Deposition.

Registrant objects to the Ausherman Declaration on the ground that Petitioner failed to provide notice of the deposition of any kind or form to Registrant as required by TBMP § 713.05 and 37 C.F.R. § 2.123(c).

Accordingly, pursuant to TBMP § 534.02, Registrant requests that the Board strike the entire Ausherman Declaration on the ground that Petitioner failed to give proper notice to Registrant of the examination of the witness. Before the deposition of a witness shall be taken by a party, due notice in writing shall be given to the opposing party of, among other things, the name of the witness, and the time when and place where the deposition will be taken. 37 C.F.R. § 2.123(c). Petitioner failed to give any notice to Registrant of the “deposition” (by way of declaration) of Ms. Ausherman. McArthur Decl.¶ 5. As a result, Petitioner failed to give Registrant any opportunity to cross-examine the witness as required by TBMP § 713.08 and 37 C.F.R. § 2.123(e)(3).

b. Not in Proper Deposition Format.

The Ausherman Declaration is not in an answer-question format as required by TBMP § 713.08, 37 C.F.R. § 2.123(e)(2) and FRCP 26(a). Additionally, the Ausherman Declaration fails to comply with the form for depositions under TBMP § 713.09.

c. Ms. Ausherman Was Not Sworn in under the Law.

Before testifying, a witness whose deposition is being taken for use in a Board

proceeding must be duly sworn, according to the law, by the officer before whom the deposition is to be taken. 37 C.F.R. § 2.123(e)(1) and TBMP § 713.08. The Ausherman Declaration fails to show that the witness was appropriately sworn in under the law. Thus, the Ausherman Declaration should not be considered by the Board as evidence as it fails to meet an essential prerequisite. On this separate basis, Registrant requests that the Ausherman Declaration be stricken in whole.

d. Not Taken Before Person Described in FRCP 28.

Deposition in *inter partes* proceedings must be taken before a person described in FRCP 28. 37 C.F.R. § 2.123(d) and TBMP § 713.07. The Ausherman Declaration fails to show that the deposition was “taken before an officer authorized to administer oaths by the laws of the United States or the place where the action is pending.” FRCP 28. Thus, the Ausherman Declaration should not be considered by the Board as evidence as it again fails to meet an essential prerequisite. On this separate basis, Registrant requests that the Ausherman Declaration be stricken in whole.

e. Not Served on Registrant.

As discussed above, not only did Petitioner fail to notice the deposition of Ms. Ausherman, but also Petitioner failed to serve a copy of the Ausherman Declaration on Registrant as required by TBMP 113.

Additionally, under 37 C.F.R. 2.125(a), a copy of the testimony together with the documentary exhibits must be served on each adverse party within thirty days after completion of the taking of that testimony. Assuming that this is submitted as a testimony deposition, again Petitioner has failed to serve within 30 days, and in fact failed to ever serve, a copy of the Ausherman Declaration or exhibits taken on April 22, 2002 (until the August 20th service of the response to Registrant’s Motion for Judgment, which contained the Notice of Reliance).

f. Taken Outside of Discovery Period.

Assuming that the Ausherman Declaration is submitted as a discovery deposition, it must be stricken as it was taken outside of the discovery period. Discovery depositions must be both noticed and taken prior to the expiration of the discovery period. TBMP § 404.01. The

Ausherman Declaration is dated April 22, 2002. The discovery period in this action closed on January 22, 2002. Petitioner never requested and the parties never stipulated to the deposition being taken outside the period. McArthur Decl. ¶ 6.

g. Not Filed with the Board.

Assuming that the Ausherman Declaration is submitted as a testimony deposition, the Ausherman Declaration further fails on the ground that Petitioner failed to file the testimony deposition with the Board. Every testimony deposition taken must be filed with the Board; a notice of reliance thereon is not necessary. 37 C.F.R. § 2.123(h) and TBMP §§ 713.12 and 404.02.

2. Documentary Evidence in Exhibits B – L.

a. Documents Lack Proper Evidentiary Foundation.

The Notice of Reliance is further substantively deficient in that the documentary evidence Petitioner gives notice of is inadmissible under the Federal Rules of Evidence and TBMP § 700 *et seq.* Petitioner has failed to lay the proper, or any, foundation for these documents. Ms. Ausherman identifies the documents in the exhibits as “printed literature printed by petitioner,” however, she fails to reasonably identify the nature of the documents, the dates of such documents or that the copies attached to the declaration are true and correct copies. In Petitioner’s Notice of Reliance, it identifies these documents as “catalogues” and “price sheets” and further identifies the dates of each document. See Exhibit A to McArthur Decl. However, it is unclear where Petitioner received the information that the so-called “literature” was a “catalogue” or “price sheet” and how it determined the dates of each document, as such information is not found in the Ausherman Declaration. Therefore, Registrant objects to the Notice of Reliance as the documentary evidence offered under the notice is not properly identified in the Ausherman Declaration and lacks proper foundation.

b. Exhibits B-L Not Properly Labeled.

Further, 37 CFR § 1.123(g)(2) requires that Exhibits be consecutively numbered and that each Exhibit be marked with the number and title of the case and the name of the party offering the exhibit. Entry and consideration may be refused for improperly marked exhibits. 37 C.F.R. § 1.123(g)(2). Exhibits B through L of the Ausherman Declaration are not

consecutively numbered and fail to comply with even the minimal standard that such exhibits be properly labeled. Registrant hereby requests that the Board refuse to enter and/or consider said Exhibits as they fail to comply with the TTAB's standards.


Therefore, Registrant objects to the Notice of Reliance on the substantive grounds that the documentary evidence offered under the Ausherman Declaration is incompetent and procedurally deficient and the documents in Exhibits B through L lack proper evidentiary foundation and are simply inadmissible. For all of the reasons set forth herein, the Notice of Reliance and the Ausherman Declaration should be stricken.

III. CONCLUSION

Once again the burden has been placed on Registrant to file the necessary and obvious objections to the continuing procedural and substantive defects in Petitioner's papers. Registrant requests that the Board strike the Notice of Reliance in its entirety as it fails to meet the procedural and substantive requirements for such motion filing with the TTAB and said defects are not curable by Petitioner. Not only does the Notice of Reliance contain no discovery documents, but the Ausherman Declaration and documentary evidence attached thereto are inadmissible. Neither the Notice of Reliance nor the Ausherman Declaration was ever served or noticed upon Registrant, thereby failing to give Registrant, as the defendant in this case, the opportunity to respond, cross-examine or take the necessary action to defend its trademark registration. Petitioner's free form approach to evidence is not a mere formality. It has raised real prejudice to Registrant. In light of the foregoing, Registrant requests that the Board strike the Notice of Reliance as a whole, and/or separately, strike the Ausherman Declaration in its entirety.

Dated: September 10, 2002

Respectfully submitted,
HERRINGTON & COMPANY, INC.

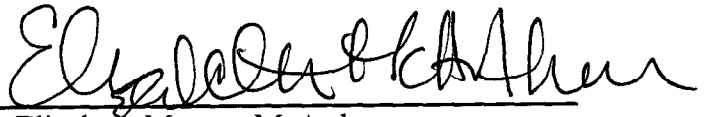
By: 

Elizabeth Clare Moreno McArthur, Esq.
P. Craig Cardon, Esq.
SQUIRE SANDERS & DEMPSEY L.L.P.
1 Maritime Plaza, Suite 300
San Francisco, CA 94111
Tel: (415) 954-0200
Attorneys for Registrant

6. Ms. Ausherman's declaration is dated April 22, 2002. The Petitioner never requested and I never stipulated to the deposition being taken outside the discovery period.

7. I never received any notice or service of a testimony deposition by Petitioner in this case.

I declare under penalty of perjury that the foregoing statements are true and correct.
Executed this 10th day of September, 2002 in San Francisco, California.


Elizabeth Moreno McArthur

09-10-2002

**UNITED STATES PATENT AND TRADEMARK OFFICE
OF THE TRADEMARK TRIAL AND APPEAL BOARD**

IN THE MATTER OF TRADEMARK REGISTRATION NO. 2,372,585
Registered August 1, 2000

BOYDS COLLECTION, LTD.,
Petitioner,

v.

HERRINGTON & COMPANY, INC.,
Registrant,

Cancellation No. 32,146

Registration No.: 2,372,585

CERTIFICATE OF MAILING BY EXPRESS MAIL ET835346004US (Express Mailing Label No.)

I hereby certify that this correspondence is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" Service under 37 C.F.R. 1.10 on August 20, 2002 and is addressed to the Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513.

Michael J. Cherskov
Name of Representative

Signature

Date of Signature

RESPONSE TO REGISTRANT'S MOTION FOR JUDGEMENT

Petitioner, Boyds Collection, Ltd. (hereafter "Petitioner") hereby responds to registrant, Herrington & Company, Inc. (hereafter "Registrant") motion for judgment under 37 C.F.R. § 2.132(a). In response to Registrant, Petitioner states as follows:

SUMMARY OF FACTS

Petitioner filed the instant cancellation on June 26, 2001.

No discovery was requested in this matter.

Closing of Petitioner's testimony period was scheduled for April 22, 2002.

On April 22, 2002, Petitioner filed a Notice of Reliance with the Trademark Trial and Appeal Board. (Attached as Exhibit 1). The Notice of Reliance satisfied all the formalities of 37 C.F.R. § 1.10 and was deposited as Express Mail on April 22, 2002 during Petitioner's Testimony period. As such, Petitioner's Notice of Reliance was timely filed with the Trademark

Trial and Appeal Board.

Petitioner has no record of receiving a Notice of Reliance from Registrant, due June 21, 2002.

On July 31, 2002, Registrant filed its Motion for Judgment. Upon receipt of that Motion on August 5, 2002, Petitioner realized that it failed to serve Registrant with its Notice of Reliance.¹

ARGUMENT

Petitioner regrets its error of not serving opposing counsel with its Notice of Reliance. The original deadline for Registrant to rebut evidence presented in Petitioner's Notice of Reliance expired August 5, 2002. As such, Petitioner requests that the TTAB provide Registrant with an opportunity to rebut Petitioner's Notice of Reliance, provided herewith as Exhibit 1.

WHEREFORE, Petitioner respectfully requests that the Trademark Trial and Appeal Board deny registrant's Motion for Judgment.

Respectfully submitted,
CHERSKOV & FLAYNIK

By 

Michael J. Cherskov
CHERSKOV & FLAYNIK
The Civic Opera Building
20 N. Wacker Drive
Chicago, IL 60606
(312) 621-1330

Dated: August 20, 2002

Attorneys for the Petitioner

¹The originally assigned attorney for Petitioner in this matter, Mr. Lawrence M. Haws, remains absent from the office since the beginning of August due to a serious illness. Otherwise, Petitioner's Notice of Reliance would have been forwarded to Registrant on August 5, 2002. Petitioner can provide a Declaration to the TTAB from Mr. Haws upon his return.

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2002, I served a copy of the foregoing Petitioner's Response to Registrant's Motion For Judgment upon Registrant Herrington and Company's counsel of record Elizabeth Moreno McArthur, by mailing a true and correct copy thereof via Express Mail having label No. ET835345998US by the United States Postal Service to the following address:

Elizabeth Moreno McArthur, Esq.
SQUIRE SANDERS & DEMPSEY L.L.P.
1 Maritime Plaza, Suite 300
San Francisco, CA 94111

Dated: _____

August 20, 2002

By: _____

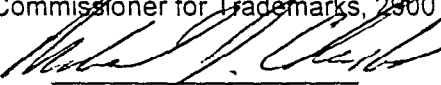

Albert Y. Tsui

IN THE UNITED STATES PATENT AND
TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD

BOYDS COLLECTION, LTD.,)	
)	Petition For Cancellation
Petitioner,)	
)	
v.)	Cancellation No: 32,146
)	
HERRINGTON & COMPANY,)	Registration No: 2,372,585
)	
Registrant-)	Date of Issue: August 1, 2000
Respondent)	
)	

CERTIFICATE OF MAILING BY EXPRESS MAIL ET829639366US (Express Mailing Label No.) I hereby certify that this correspondence is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" Service under 37 C.F.R. 1.10 on April 22, 2002 and is addressed to the Assistant Commissioner for Trademarks, 2000 Crystal Drive, Arlington, Virginia, 22202-3513.

Michael J. Cherskov
Name of Representative


Signature

Apr 22, 2002
Date of Signature

NOTICE OF RELIANCE

Pursuant to 37 CFR Section 2.122(c) BOYDS COLLECTION, LTD., ("Petitioner"), hereby submits to the Trademark Trial and Appeal Board within the time set for Plaintiff's testimony period, the following Exhibits that Petitioner intends to rely upon as evidence in its Main Brief.

Exhibit A Declaration of Petitioner Employee Kelly S. Ausherman

Exhibit B comprises one-page of a 1999 catalog.

Exhibit C comprises a 1990 one-page price sheet.

Exhibit D comprises a 1990 one-page price sheet.

In re: TBC HERRINGTON'S TEDDY BEAR CLUB
Cancellation No: 32,146
Testimony Period
Page -2-

Exhibit E comprises one-page of a 1990 catalog.

Exhibit F comprises one-page of a 1989 catalog.

Exhibit G comprises one-page of a 1999 catalog.

Exhibit H comprises one-page of a 1990 catalog.

Exhibit I comprises one-page of a 1999 catalog.

Exhibit J comprises one-page of a 1999 catalog.

Exhibit K comprises one-page of a 1999 catalog.

Exhibit L comprises one-page of a 1990 catalog.

Respectfully submitted,

CHERSKOV & FLAYNIK

By 

Michael J. Cherskov (PTO Reg. No. 33,664)
CHERSKOV & FLAYNIK
The Civic Opera Building, Suite 1447
20 N. Wacker Drive
Chicago, IL 60606
(312) 621-1330

Dated: April 22, 2002

Attorneys for the Petitioner

IN THE UNITED STATES PATENT AND
TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD

BOYDS COLLECTION, LTD.,

Petitioner,

v.

HERRINGTON & COMPANY,

Registrant-
Respondent

Evidence Declaration

Cancellation No: 32,146

Registration No: 2,372,585

Date of Issue: August 1, 2000

OF MAILING BY EXPRESS MAIL ET829639366US (Express Mailing Label No.) I hereby certify
that this correspondence is being deposited with the United States Postal Service "Express Mail Post
Office to Addressee" Service under 37 C.F.R. 1.10 on April 22, 2002 and is addressed to
the Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513.
Michael J. Cherskov
Name of Representative Signature Date of Signature April 24, 2002

DECLARATION

The undersigned, declares as follows:

1. My name is Kelly S. Ausherman. I am the Customs Compliance Analyst
of The Boyds Collection LTD, (hereinafter TBC) having a principal place of business at 360 South Street,
McSnerrystown, PA. I have been employed at TBC since 1996.
2. I am familiar with the trademarks and trade names owned by TBC. I
coordinate trademark filings and trademark clearance searches with TBC's trademark counsel on a daily
basis.
3. "TBC" is a well-known short hand description of "The Boyds Collection"
and is used extensively in the industry and by consumers. For example, "TBC" is used by high-end
figurine and plush doll collectors to signify the petitioner.

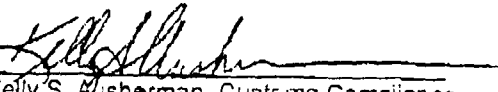
4. "TBC" also is used in petitioner's newsletter, and is used as a designation of source of origin on virtually all other printed literature printed by the petitioner, exemplars of that literature attached hereto as Tabs B-L.

5. "TBC" also is stamped on various resin pieces and plush pieces manufactured and sold by the Petitioner. For example, "TBC" is stamped on Petitioner's snow-globes and on the sewn in labels on the plush.

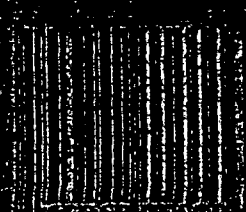
I hereby declare that all statements made herein are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any trademark issuing herein, or any trademark to which this verified statement is directed.

THE BOYDS COLLECTION, LTD

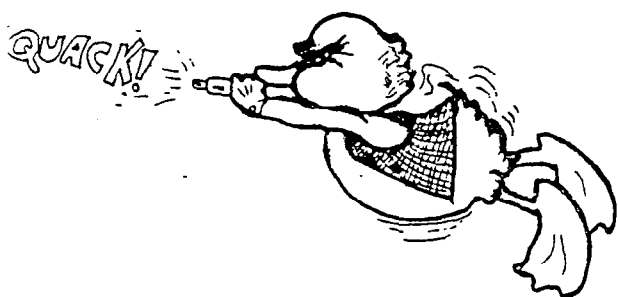
By


Kelly S. Ausherman, Customs Compliance

Officer.

[illegible]

THE MUSEUM SERIESTM - Antique Style Distressed Decoys - ea.			
muscum piotail ea.	18"	\$5.00	
muscum mallard drake ea.	16"	\$5.00	
muscum wood duck ea.	16"	\$5.00	
muscum bluebill	14"	\$0.00	
muscum bufflehead	14"	\$0.00	



Style #	Description	Length	Price	Quantity	Total
THE MASTER'S SERIES—Cast Miniature Decoys					
9000	master's mallard drake	6 1/2"	12.50		
9002	master's loon	8"	15.00		
9003	master's canada goose	8 1/2"	18.75		
9004	master's whistling swan drake	9"	17.50		
9005	master's whistling swan hen	9"	17.50		
9006	master's blue wing teal	5"	11.00		
9007	master's green wing teal	5"	11.00		
9008	master's pintail drake	8"	17.50		
9009	master's r.b. merganser	7 1/2"	18.75		
9010	master's bufflehead	4 1/2"	11.00		
9011	master's mallard hen-swimmer	8"	15.00		
9014	master's mallard hen	6 1/2"	15.00		
9015	master's redhead drake	4 1/2"	11.00		
9016	master's ruddy duck	4 1/2"	11.00		
9017	master's widgeon	6 1/2"	15.00		
9018	master's wood duck	7"	17.50		
9019	master's cinnamon teal	5"	11.00		
9020	master's mallard sleeper	6"	12.50		
9021	master's redhead hen	4 1/2"	11.00		
9022	master's black swan	9"	17.50		
FLK-1	Block 1 (one each all styles plus one extra mallard drake - 21 pcs)		299.50		
FLK-2	Block 2 (38 piece assortment) if ordered separately \$548.25 save \$48.26! or 9%!		499.00		
DISP	DISPLAY CASE		50.00		

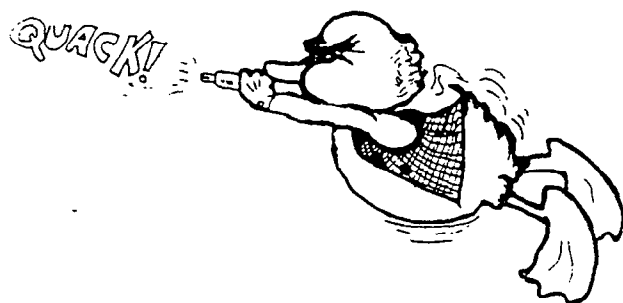
JILL STRAUSBAUGH-CARVERS' CHOICE™			
7100	rabbit gabriel plaque	17.50	
7101	bear gabriel plaque	17.50	
7102	love conquers all plaque	20.00	
7110	rabbit gabriel ornament	4.00	
7111	bear gabriel ornament	4.00	
7112	ted e. bear ornament	4.00	
7113	bear skater	4.00	
7114	father christmas ornament	4.00	
7115	santa with bag ornament	4.00	
7116	angel bear ornament	4.00	
7117	santa bear ornament	4.00	
7120	tree santa	4.00	
7121	christmas goose	4.00	
7122	santas sleigh	4.00	
7123	santas face	4.00	
7124	antique santa	4.00	
7125	magic santa	4.00	
7150	wooden momma cat	15.00	
7151	wooden poppa cat	15.00	
7152	wooden angel bear	15.00	
7153	wooden momma rabbit	15.00	
7154	wooden poppa rabbit	15.00	

SPECIAL INSTRUCTIONS:

Style #	Description	Length	Price	Quantity	Total
WOODEN DECOYS					
7012A	classic mallard drake	12"	27.50		
7014A	classic mallard hen	12"	27.50		
7015	common loon	14"	25.00		
7017	hunter's mallard	17"	38.50		
7018	hunter's goose	17"	50.00		
7020	hunter's pintail	21"	50.00		
7022	hunter's pheasant	15"	42.50		
7040A	classic green wing teal drake	12"	30.00		
7041A	classic green wing teal hen	12"	30.00		
7046A	classic redhead drake	14"	32.50		
7047A	classic redhead hen	14"	32.50		
7048A	classic pintail	16"	30.00		
7050A	classic widgeon	14"	30.00		
7059A	classic puffin-standing a.s.	8"	30.00		
7060	hunter's green wing teal	12"	37.50		
7070	hunter's mallard sleeper	12"	38.50		
7073	hunter's redhead	16"	47.50		
7075	hunter's wood duck	16"	40.00		
7076	hunter's ruddy duck a.s.	12"	37.50		
7203	resting swan a.s.	9"	17.50		
7301	barnegat swan a.s.	12"	20.00		
7302	barnegat swan-preening a.s.	12"	20.00		
7303	barnegat swan-large a.s.	16"	27.50		
THE MINNESOTA FLATS™					
7080	minnesota flats™ loon preener	15"	15.00		
7081	minnesota flats™ loon-swimmer	22"	15.00		
7082	minnesota flats™ loon-feeder	17"	15.00		
7090	mini-loon set-3 pc.	8"	12.50		
7091	canada goose preener	15"	15.00		
7092	canada goose-swimmer	22"	15.00		
7093	canada goose-sentinel	17"	15.00		
7094	mini-canada goose set-3 pc.	8"	12.50		
7095	mallard-swimmer	22"	15.00		
7096	mallard-sleeper	15"	15.00		
7097	mallard-feeder	17"	15.00		
7099	mini-mallard set-3 pc.	8"	12.50		
7304	swan-preener	15"	15.00		
7305	swan-swimmer	22"	15.00		
7306	swan-sentinel	17"	15.00		
7307	mini-swan set-3 pc.	8"	12.50		
3002	string o trout (3 pc) a.s.	9"-13"	30.00		
THE MUSEUM SERIES™. Antique Style Distressed Decoys - a.s.					
8943	museum pintail a.s.	18"	55.00		
8944	museum mallard drake a.s.	16"	55.00		
8945	museum wood duck a.s.	16"	55.00		
8946	museum bluebill	14"	50.00		
8947	museum bufflehead	14"	50.00		

Style #	Description	Length	Price	Quantity	Total
THE MASTER'S SERIES—Cast Miniature Decoys					
9000	master's mallard drake	6 1/2"	12.50		
9002	master's loon	8"	15.00		
9003	master's canada goose	8 1/2"	18.75		
9004	master's whistling swan drake	9"	17.50		
9005	master's whistling swan hen	9"	17.50		
9006	master's blue wing teal	5"	11.00		
9007	master's green wing teal	5"	11.00		
9008	master's pintail drake	8"	17.50		
9009	master's r.b. merganser	7 1/2"	18.75		
9010	master's bufflehead	4 1/2"	11.00		
9011	master's mallard hen-swimmer	8"	15.00		
9014	master's mallard hen	6 1/2"	15.00		
9015	master's redhead drake	4 1/2"	11.00		
9016	master's ruddy duck	4 1/2"	11.00		
9017	master's widgeon	6 1/2"	15.00		
9018	master's wood duck	7"	17.50		
9019	master's cinnamon teal	5"	11.00		
9020	master's mallard sleeper	6"	12.50		
9021	master's redhead hen	4 1/2"	11.00		
9022	master's black swan	9"	17.50		
FLK-1	flock 1 (one each all styles plus one extra mallard drake - 21 pcs)		299.50		
FLK-2	flock 2 (38 piece assortment) if ordered separately \$548.25 save \$48.26! or 9%!		499.00		
DISP	DISPLAY CASE		50.00		
JILL STRAUBAUGH-CARVERS' CHOICE™					
7100	rabbit gabriel plaque	17.50			
7101	bear gabriel plaque	17.50			
7102	love conquers all plaque	20.00			
7110	rabbit gabriel ornament	4.00			
7111	bear gabriel ornament	4.00			
7112	ted c. bear ornament	4.00			
7113	bear skater	4.00			
7114	father christmas ornament	4.00			
7115	santa with bag ornament	4.00			
7116	angel bear ornament	4.00			
7117	santa bear ornament	4.00			
7120	tree santa	4.00			
7121	christmas goose	4.00			
7122	santas sleigh	4.00			
7123	santas face	4.00			
7124	antique santa	4.00			
7125	magic santa	4.00			
7150	wooden momma cat	15.00			
7151	wooden poppa cat	15.00			
7152	wooden angel bear	15.00			
7153	wooden momma rabbit	15.00			
7154	wooden poppa rabbit	15.00			

SPECIAL INSTRUCTIONS:



The Archive Series™, the distillation of eleven years of bear making, inspired by our love of things antique & teddys, our hearloom bears remind us of a simpler time when problems were solved not by accountants, judges, arbitration panels but by a hug and a teddy.

our 'fibre filled' bears are fully jointed, hand embroidered, come with a collectors hangtag, are named after British Prime Ministers, and they can stand on their head!

From Left to Right - Top Row		From Left to Right - Bottom Row	
5'01"	Gladstone	5'06"	Thatcher
5'11"	Alex	5'00"	Churchill
5'10"	Clement	5'05"	Wilson
5'00"	Churchill	5'03"	Deale
5'02"	McMullen	5'00"	Chamberlain
		5'08"	Teden
		5'07"	Neville
		5'04"	Callaghan
			8"



THE BOYDS COLLECTION LTD, P.O. BOX 4385 GETTYSBURG, PENNSYLVANIA 17325, PHONE: 717-359-7312 or 717-359-1150 FAX: 717-359-3502
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IT'S YOUR LAST CHANCE!

The players in the Boyds B.S. 187 grade school's Holiday Pageant are about to make their Final Curtain Call!

This Pageant Series made its debut in 1995, with four new pieces added each subsequent year. It's time for a new Pageant Production (see page 2), so this series is about to Retire.

On December 31, 1999, as the Big Apple drops on Times Square, The Head Bean will smash all the molds for this series of Bearstone Figurines. Don't spend the next Millennium searching for the pieces you missed!



2411 (D4)+ aniel & clarence as the pair o' angels (*set of 2)

2411+

2425 (F4)+ the stage

2414 (E4)+ ms. brum... as the teacher

2416 (E4)+ serendipity... as the guardian angel

2406 (J4)+ raleigh... as bathasar

2402 (F4)+ theresa... as mary

2404 (J4)+ wison... as melchior

2401 (F4)+ geoffie... as joseph

2415 (E4)+ matthew... as the drummer

2410 (D4)+ bruce... as the shepherd

2403 (F4)+ baldwin... as the child

2407 (J4)+ thatcher & eden... as the camel

2412 (E4)+ caledonia... as the narrator

2408 (D4)+ edsox... as the donkey

2409 (D4)+ winko & dink... as the ants

BOYDS BEARS & FRIENDS™

... The Bearstone Collection

"There's Only One... you can Trust" SM 187

Each original version is stamped on the bottom with the name, style number, copyright, and year. Each sculpture is hand-cast with the edition and piece number. All of our Creations have a pawprint somewhere on the piece. Always look for our Pawprint as your Symbol of Authenticity...



BOYDS BEARS & FRIENDS, LTD.
CLIFFSBURG, PENNSYLVANIA 18830
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Gae Sharps Design

J. B. Bean and Associates

poseable, distinguished and slightly eccentric
bean bag collectibles
looks rich, but not expensive

5400
Martin
Mutual

5306
Samuel
Catberg

5204
Briton R.
Hare

5323
Ernest Q.
Grimlikin

5304
Ernest Q.
Grimlikin

5104
Winston B.
Bean

Irving
Frochberg

The
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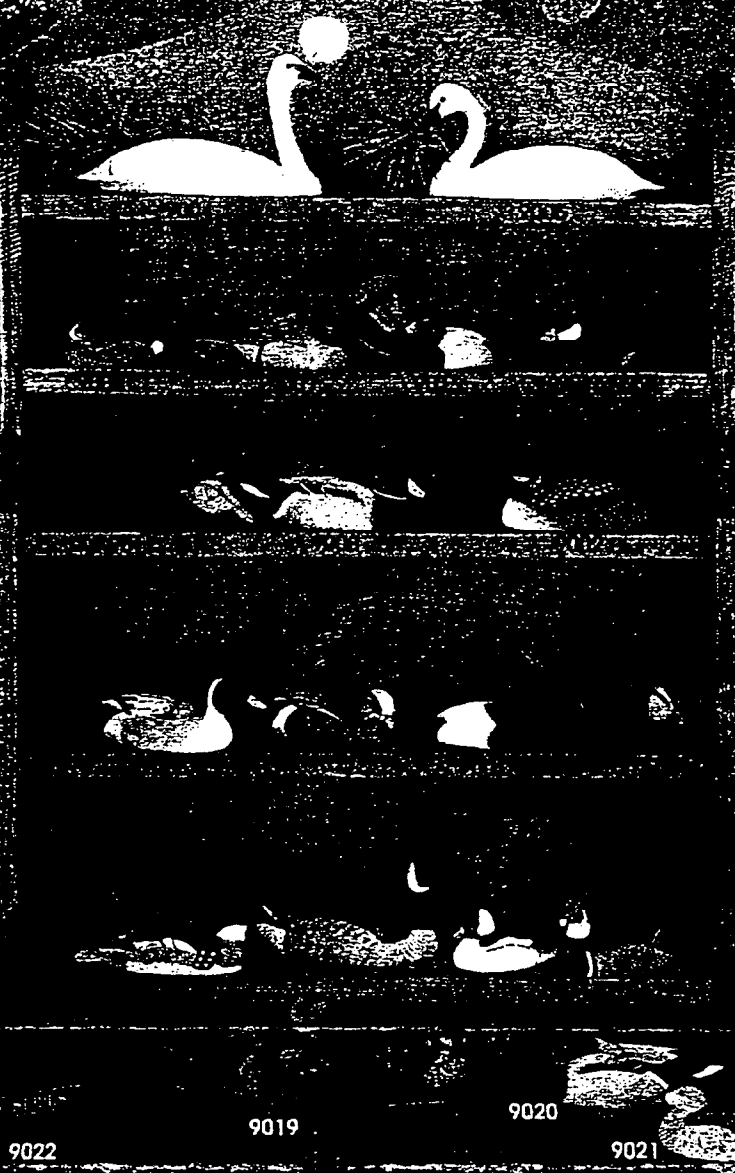
• (717) 359-4450

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the master's series...

Introducing a full line of decorative miniature waterfowl, incredibly detailed and beautifully painted. Starting from an intricately carved and wood-burned master piece, a mold is formed which recreates with incredible clarity every detail of the wood original. Then, using Duckstone™, our own unique bonded resin formulated especially for decoy casting, a replica is cast from the mold. This reproduction is then handed to a master artisan for detailed hand painting. Upon completion the decoy is signed by the painter.

- 9000 Master's Mallard Drake 5 1/2"
- 9001 Master's Canvasback 6 1/2"
- 9002 Master's Loon 8"
- 9003 Master's Canada Goose 8 1/2"
- 9004 Master's Whistling Swan Drake 9"
- 9005 Master's Whistling Swan Hen 9"
- 9006 Master's Blue Wing Teal 5"
- 9007 Master's Green Wing Teal 5"
- 9008 Master's Pintail Drake 8"
- 9009 Master's P. B. Marander 7 1/2"
- 9010 Master's Buffhead 4 1/2"
- 9011 Master's Mallard Hen Swimmer 8"
- 9014 Master's Mallard Hen Swimmer 6 1/2"
- 9015 Master's Red Head 4 1/2"
- 9016 Master's Bufflehead 4 1/2"
- 9017 Master's Widgeon 6 1/2"
- 9018 Master's Wood Duck 7"
- 9019 Master's Cinnamon Teal 5"
- 9020 Master's Mallard Steeper 6"
- 9021 Master's Redhead Hen 4 1/2"
- 9022 Master's Black Scaup 7"



9022

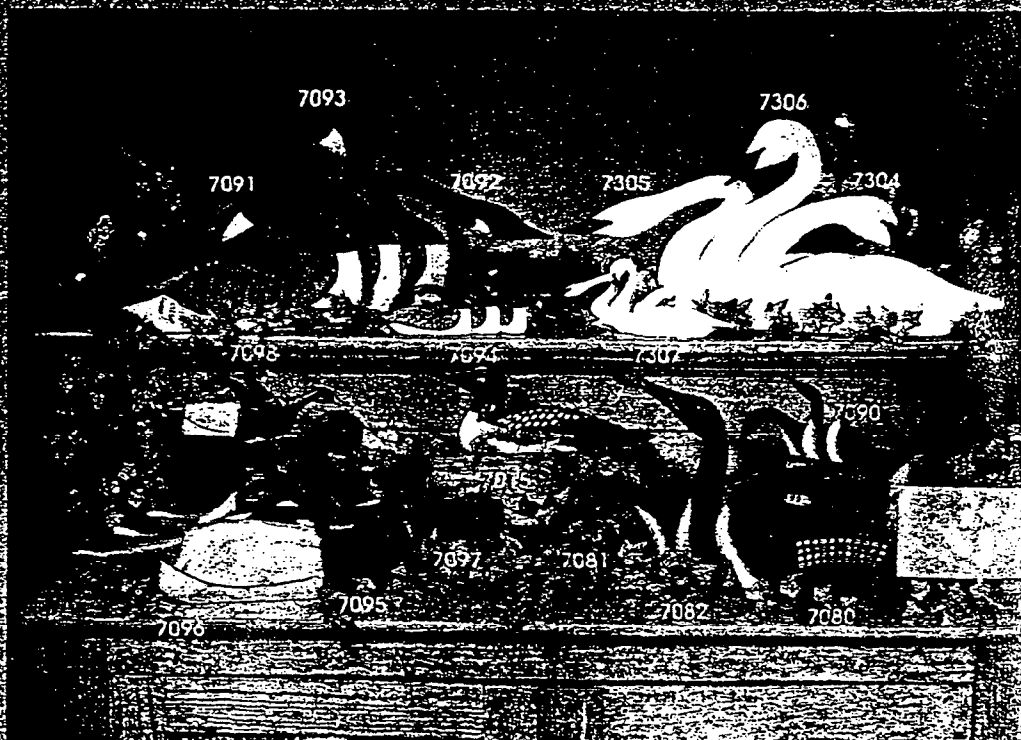
9019

9020

9021

the minnesofa flats™

- | | | |
|--------------------------|--------------|-----|
| 1 F. M. P. Canada Goose | Pregnant | 15" |
| 2 F. M. P. Canada Goose | Swimmer | 17" |
| 3 F. M. P. Canada Goose | Swimmer | 22" |
| 4 F. M. P. Canada Goose | Set of three | 8" |
| 5 F. M. P. Mallard Swans | Set of three | 8" |
| 6 F. M. P. Swan | Swimmer | 22" |
| 7 F. M. P. Swan | Swimmer | 17" |
| 8 F. M. P. Swan | Swimmer | 15" |
| 9 F. M. P. Mallard | Set of three | 8" |
| 10 F. M. P. Mallard | Swimmer | 15" |
| 11 F. M. P. Mallard | Swimmer | 17" |
| 12 F. M. P. Mallard | Swimmer | 22" |
| 13 F. M. P. Mallard | Swimmer | 22" |
| 14 F. M. P. Mallard | Swimmer | 22" |
| 15 F. M. P. Mallard | Swimmer | 22" |
| 16 F. M. P. Mallard | Swimmer | 22" |
| 17 F. M. P. Mallard | Swimmer | 22" |
| 18 F. M. P. Mallard | Swimmer | 22" |
| 19 F. M. P. Mallard | Swimmer | 22" |
| 20 F. M. P. Mallard | Swimmer | 22" |
| 21 F. M. P. Mallard | Swimmer | 22" |
| 22 F. M. P. Mallard | Swimmer | 22" |
| 23 F. M. P. Mallard | Swimmer | 22" |
| 24 F. M. P. Mallard | Swimmer | 22" |
| 25 F. M. P. Mallard | Swimmer | 22" |
| 26 F. M. P. Mallard | Swimmer | 22" |
| 27 F. M. P. Mallard | Swimmer | 22" |
| 28 F. M. P. Mallard | Swimmer | 22" |
| 29 F. M. P. Mallard | Swimmer | 22" |
| 30 F. M. P. Mallard | Swimmer | 22" |
| 31 F. M. P. Mallard | Swimmer | 22" |
| 32 F. M. P. Mallard | Swimmer | 22" |
| 33 F. M. P. Mallard | Swimmer | 22" |
| 34 F. M. P. Mallard | Swimmer | 22" |
| 35 F. M. P. Mallard | Swimmer | 22" |
| 36 F. M. P. Mallard | Swimmer | 22" |
| 37 F. M. P. Mallard | Swimmer | 22" |
| 38 F. M. P. Mallard | Swimmer | 22" |
| 39 F. M. P. Mallard | Swimmer | 22" |
| 40 F. M. P. Mallard | Swimmer | 22" |
| 41 F. M. P. Mallard | Swimmer | 22" |
| 42 F. M. P. Mallard | Swimmer | 22" |
| 43 F. M. P. Mallard | Swimmer | 22" |
| 44 F. M. P. Mallard | Swimmer | 22" |
| 45 F. M. P. Mallard | Swimmer | 22" |
| 46 F. M. P. Mallard | Swimmer | 22" |
| 47 F. M. P. Mallard | Swimmer | 22" |
| 48 F. M. P. Mallard | Swimmer | 22" |
| 49 F. M. P. Mallard | Swimmer | 22" |
| 50 F. M. P. Mallard | Swimmer | 22" |



The Boyds Collection Ltd.

began in 1979 as a small antique shop in rural Maryland. As we hunted the country back roads for affordable antiques, we realized that others must be looking for the same quality, collectibility, and affordability...and set out to design, produce and market our own beautiful collectible products.

Over the past twenty-one years we've grown, evolved, & progressed...but we still strive to offer a combination of Aesthetics, Craftsmanship, and "Whimsy" that represent a True Value to today's Collector.

From the very first duck decoy that we hand-painted in our Maryland shop...through our introduction of a merino wool bear in 1984...to the Bearstone Collection...to the wide range of products we continue to create - We appreciate you, our Collectors and Friends.

So "Thank You" - from The Head Bean and the Folks at Boyds!

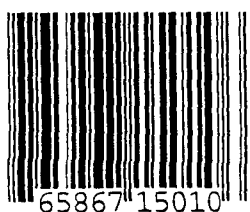
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Gettysburg, Pennsylvania 17325-4385

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Your Boyds Bear™ Dealer is...



"Bears & Hares... You can Trust"™

www.BoydsCollectibles.com

≡ The Loyal Order of Friends of Boyds (or F.o.B. for short!) ≡ "Tea for Three"...The Year 2000 Boyds Collectors' Club

The Brewin' F.o.B. Kit... Join **Caitlin Berriweather**, the member-exclusive 6" gold Plush Bear who is always ready to listen to a Great Story...or share a few Tales of her own! Caitlin is always propahly Dressed for the Occasion in her Hat and Chenille Sweater...and has a special foot pad F.o.B. label.

The Brewin' F.o.B. Kit will also include our Resin Masterpiece "Catherine and Caitlin Berriweather...Fine Cup of Tea". You can almost hear the tea pourin' amongst the Chatter (and Boyds bears aren't known for daintily doing anything!)

▲ #02000-11, "Caitlin Berriweather" pin



Club Members will also receive The Brewin' F.o.B. Bearwear Pin - portraying Caitlin Berriweather enjoying her beverage of choice. Club pins are a great way to proudly show off your love of Boyds...unless you'd rather keep it a Secret. (Can't blame you there!)

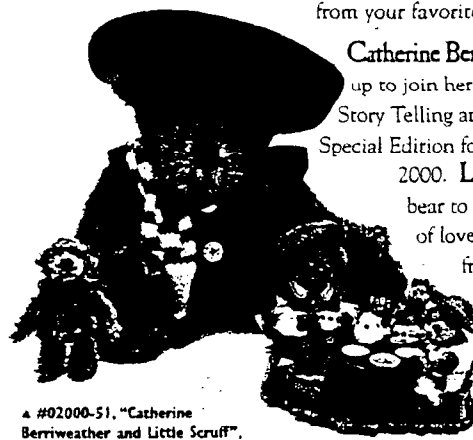


▲ #02000-21, "Catherine and Caitlin Berriweather...A Fine Cup of Tea"

▲ #02000-31, "Caitlin Berriweather"

There's a place set just for you at our Tea Party.

Also...you have the opportunity to complete your "Tea for Three" party with our wonderful Redemption Pieces that you can order from your favorite Boyds Retailer:



▲ #02000-51, "Catherine Berriweather and Little Scruff", our Plush Redemption Pieces

Catherine Berriweather, an 11" plush bear all fancied up to join her daughter Caitlin for a quiet afternoon of Story Telling and Tea Tasting. Catherine also has a Special Edition foot pad label commemorating the year 2000. **Little Scruff**, a 3" plush bear is the last bear to join the Party, a little rattled from years of love but still anxious to join her closest friends.

Our Bearstone Resin Masterpiece "Catherine and Caitlin Berriweather with Little Scruff...Family Traditions" is fully detailed for a complete setting for three...even a few little Crumpets for them to munch on as their Memories Unfold.

▲ #02000-41, "Catherine and Caitlin Berriweather with Little Scruff...Family Traditions", our Resin Redemption Piece

Ask your Boyds Dealer how you too can become a "Brewin' F.o.B" (and the only brew we're referring to is for Sippin'...not for chuggin!)

There's more! No Tea Party would be complete without a Tea Set...or a Mini Tea-Set in this case. Members Only will have the opportunity to purchase the Official Brewin' F.o.B. Mini-Tea Set...for three of course!



▲ #02000-65, the "Brewin' F.o.B." Official Mini-Tea Set (COLOR MAY VARY)

One more thing...available only to "Brewin' F.o.B.s" through our Bearstone Dealers...Noah's Tool Chest...an exclusive Members' piece in our Pageant Series "Noah & Co. - Ark Builders". Watch for it!!!

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Sinclair Bearsford,
see page 46

On front cover:
Eleanore Bearsevelt,
see page 22

Santa's Snow Suits

When Santa's runnin'
on baubles and
beads, he calls on
the Bearstones...
Suit 'em up, and
ship 'em out!"

REJOICE



Bearstone ornaments: Angelbrite,
Snowbearski and Hansel, see page 12

On front cover: Father Kristmas, see page 4

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Boyd's Stuff  **com** SM

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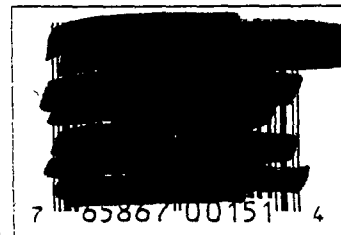
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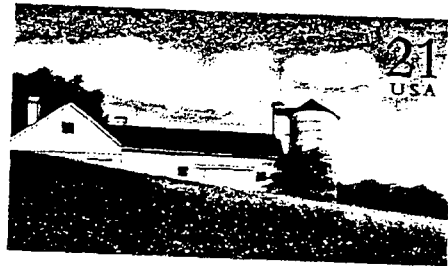
On the date stamped hereon, the Assistant Commissioner for Trademarks acknowledges receiving a 2-page Notice of Reliance with Exhibits A-L.

In re: Cancellation No.: 32,146

Boys Collection v. Herrington & Company

Atty Dkt: 00107/00805

The aforementioned mailed via Express mail on Monday, April 22, 2002 on Label No.:ET829639366US.



CHERSKOV & FLAYNIK
SUITE 1447
20 N. WACKER DRIVE
CHICAGO, IL 60606

ET 896E9628 13

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2002, I served a copy of the foregoing REGISTRANT'S MOTION TO STRIKE AND OBJECTIONS TO PETITIONER'S NOTICE OF RELIANCE AND EVIDENCE DECLARATION OF KELLY AUSERMAN upon petitioner Boyds Collection, Ltd.'s counsel of record, Michael J. Cherskov, Esq., by mailing a true and correct copy thereof by postage prepaid First Class United States Mail to the following address:

Michael J. Cherskov
CHERSKOV & FLAYNIK
The Civic Opera Building, Suite 1447
20 N. Wacker Drive
Chicago, IL 60606

DATED: September 10, 2002

By: Sadie Lum
Name: Sadie Lum

Express Mail mailing label No. **EL 952565413 US**

Date of Deposit **September 10, 2002**

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to: Commissioner for Trademark, 2900 Crystal Dr., Arlington, VA 22202-3513.

Sadie Lum

(Type or Print Name of Person Mailing Paper or Fee)

Sadie Lum

(Signature of Person Mailing Paper or Fee)

Elizabeth McArthur, Esq.
Squire, Sanders & Dempsey L.L.P.
One Maritime Plaza
Suite 300
San Francisco, CA 94111
(415) 954-0200

Attorneys for Registrant

**SQUIRE
SANDERS**

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COUNSEL
WORLDWIDE

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One Maritime Plaza, Suite 300
San Francisco, California 94111-3492

Office: +1.415.954.0200
Fax: +1.415.393.9887

Direct Dial: +1.415.954.0287
emcarthur@ssd.com

September 10, 2002

BY U.S. EXPRESS MAIL

U.S. Patent & TMO/TM Mail Rpt. Dt. #57

09-10-2002

United States Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513
Attention: Legal Assistant, TTAB

TRADEMARK TRIAL AND
APPEAL BOARD
02 SEP 24 PM 9:44

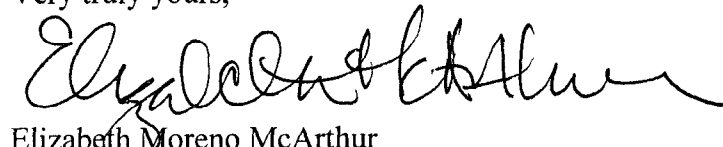
Re: Cancellation No.: 32,146
Mark: TBC HERRINGTON'S TEDDY BEAR CLUB & Design
Registration No.: 2,372,585
Registration Date: August 1, 2000
Registrant: Herrington & Company, Inc.
Our Ref.: 40362.6

Dear Sir or Madam:

Enclosed herewith is Registrant's Motion to Strike and Objections to Petitioner's Notice of Reliance and Evidence Declaration of Kelly Ausherman for the above referenced matter. So that we may have a timely record of receipt of the enclosed, please date-stamp the enclosed, stamped, self-addressed post card, and deposit it into the U.S. mail.

Please direct all correspondence regarding this matter to my attention.

Very truly yours,



Elizabeth Moreno McArthur
Attorney at Law

EMM/sl

Enclosure

Copy: P. Craig Cardon